PP

v.

MOHD SALIM HAMIDDULRAHMAN

HIGH COURT MALAYA, PULAU PINANG
JEFFREY TAN J
[CRIMINAL REVISION NO: 43-3-1998]
24 JULY 1998

CRIMINAL PROCEDURE: *Sentence - Imposition of fine in addition to imprisonment - Meaning of words "and" and "shall be liable" - Whether prescribed fine must be imposed - Anti Corruption Act 1997, s. 16(a) & (b)*

STATUTORY INTERPRETATION: *Construction of statutes - Conjunctive or disjunctive - Meaning of word "and" in between paragraphs - Anti Corruption Act 1997, s. 16(a) & (b)*

WORDS & PHRASES: *"And" - Anti Corruption Act 1997, s. 16(a) & (b) - Whether prescribed fine must be imposed in addition to imprisonment*

This was an application by the Sessions Court for revision of sentence. The accused who pleaded guilty to an offence under s. 11(b) of the Anti-Corruption Act 1997 ('the ACA') and to an offence under s. 6(3) of the Immigration Act 1959/1963 was sentenced to eight months' and six months' imprisonment respectively by the trial court. However, with regard to the fine specified in s. 16(b) of the ACA, the trial court declined to impose the fine, stating that the word "liable" preceding paras (a) and (b) of s. 16 gave the court an absolute discretion both as to the form and extent of the sentence, and that therefore the word "and" between s. 16(a) and (b) should be read disjunctively – in other words construing the word "and" as "or".

Held:

[1] The ordinary meaning of the word "and" is best conveyed by the words "together with". It is a conjunction connecting words or phrases, expressing the idea that the latter is to be added to or taken along with the first. It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and what comes after. In its conjunctive sense, the word is used to conjoin words, clauses or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which precedes.

[2] It was incumbent upon the trial court to interpret literally, by giving s. 16 of the ACA its ordinary, plain and natural meaning, which is that "any person convicted ... shall be liable to imprisonment ... and a fine." That, however, is not to say that the prescribed form of punishment under s. 16 of the ACA is mandatory. But if a court should act under s. 16 of the ACA, then it cannot deny the effect of s. 16 but must impose the prescribed imprisonment under s. 16(a) and the prescribed fine under s. 16(b) thereof.

[Order accordingly.]

Cases referred to:

Abbott v. Middleton [1858] 7 HLC 114 ***(cit)***
Abu Seman v. PP [1982] 2 MLJ 338 ***(refd)***
Biffin v. Yorke 5 Man & G 428 ***(cit)***
Chan Chin Ming v. Lim Yok Eng [1994] 3 CLJ 687 ***(foll)***
Chin Choy & Ors v. Collector of Stamp Duties [1979] 1 MLJ 69 ***(cit)***
Chor Phaik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 ***(refd)***
Creswell v. BOC Ltd [1980] 3 All ER 443 ***(cit)***
Darus v. PP [1964] MLJ 322 ***(refd)***
Duport Steels Ltd v. Sirs [1980] 1 All ER 529 ***(refd)***
Farell v. Alexander [1977] AC 59 ***(refd)***
Federal Steam Navigation Co Ltd v. Department of Trade and Industry [1974] 2 All ER 97 ***(foll)***
Foo Yoke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511 ***(refd)***
H Rubber Estates Bhd v. Director General of Inland Revenue [1979] 1 MLJ 115 ***(refd)***
Jayanathan v. PP [1973] 2 MLJ 68 ***(refd)***
Magor & St Mellons Rural District Council v. Newport Borough Council [1952] AC 189 ***(refd)***
Maunsell v. Olins [1975] AC 373 ***(cit)***
Philip Lau Chee Heng v. PP [1988] 1 CLJ 873 ***(refd)***
PP v. Hew Yew [1972] 1 MLJ 164 ***(refd)***
PP v. Lee Ah Sam [1949] MLJ 236 ***(refd)***
PP v. Sihabduin Hj Salleh & Anor [1981] 1 CLJ 39 ***(refd)***
PP v. Sharikat Perusahaan Makanan Haiwan Bekerjasama 2 [1969] 2 MLJ 250 ***(refd)***
Pepper v. Hart [1992] 3 WLR 1032 ***(refd)***
R v. Oakes [1959] 2 All ER 92 ***(refd)***
RF Brown & Co Ltd v. T & J Harrison [1927] 43 TLR 394 ***(refd)***
Rubber Estates Bhd v. Director-General of Inland Revenue [1979] 1 MLJ 115 ***(refd)***
Stock v. Frank Jones (Tipton) Ltd [1978] 1 WLR 231 ***(refd)***
Sutherland Publishing Co Ltd v. Caxton Publishing Co Ltd [1938] Ch 174 ***(refd)***
Tan Boon Kean v. PP [1995] 4 CLJ 456 ***(refd)***
Yew Lean Finance Development (M) Sdn Bhd v. Director of Lands & Mines, Penang [1977] 2 MLJ 45 ***(refd)***
Western Bank Ltd v Schindler [1977] 1 Ch 18 ***(refd)***

Legislation referred to:
Anti Corruption Act 1997, ss. 11(b), 16(a), (b)
Criminal Procedure Code, s. 294
Immigration Act 1959/1963, s. 6(3)

Other sources referred to:
Black's Law Dictionary, 6th edn, pp 86, 1375
Interpretation of Statutes, Maxwell, 12 edn, p 28
Statutory Interpretation, Cross, 2nd edn, p 192

For the Public Prosecutor - Yaacob Hj Md Sam
Accused in person
Amicus Curae - S Asamaley

Reported by Mariette Peters-Goh

JUDGMENT

Jeffrey Tan J:

This application by the Sessions Court, Butterworth for revision of its sentence calls for a construction of s. 16 of the Anti-Corruption Act 1997 which came into effect on 8 January 1998.

Section 16 of the Anti-Corruption Act 1997 reads as follows:

> Any person who is found guilty of an offence under section 10, 11, 13, 14 or 15 shall on conviction be liable to –
>
> (a) imprisonment for a term of not less than fourteen days and not more than 20 years; and
>
> (b) a fine of not less than five times the sum or value of the gratification which is the subject-matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higner.

Stated briefly, the accused who pleaded guilty to an offence under s. 11(b) of the Anti-Corruption Act 1997 and to an offence under s. 6(3) of the Immigration Act 1959/1963 was sentenced to eight months and six months imprisonment respectively by the trial court. However, with regard to the fine specified in s. 16(b) of the Anti-Corruption Act, the trial court declined to impose the specified fine; in its application for revision dated 7 May 1998 the trial court expounded that the words "shall be liable" preceding sub-ss. 16(a) and 16(b) gave the court an absolute discretion both as to the form and extent of the sentence, and that therefore, the word "and" betwixt sub-ss. 16(a) and 16(b) should be read disjunctively, in other words, construing the word "and" as "or", and not conjunctively.

It really needs little reminding that in the construction of a statute, the courts will give the "ordinary, plain and natural meaning" of the words contained in a statute (*Creswell v. BOC Ltd* [1980] 3 All ER 443), for "applying the words and phrases of a statute in their ordinary meaning has been said to be the first and most elementary rule of construction and the second is said to be to construe the phrases and sentences according to the rule of grammar" (*Chin Choy & Ors v. Collector of Stamp Duties* [1979] 1 MLJ 69 per Chang Min Tat FJ)

One of the cardinal rules is to adhere as closely as possible to the literal meaning of the words (*Abbott v. Middleton* [1858] 7 HLC 114). "... the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute or otherwise produces some injustice absurdity anomaly or contradiction, in which case some secondary sense may be preferred, so as to obviate the injustice, absurdity anomaly or contradiction or fulfill the purpose of the statute" *Maunsell v. Olins* [1975] AC 373 per Lord Simon.

If the meaning of the words in the statute is clear, certain or unambiguous, the courts will interpret them literally, by giving them their plain and natural meaning. Once the literal meaning has been established, then however unjust, arbitrary or inconvenient such meaning may be, it must receive its full effect (*Biffin v. Yorke* 5 Man & G 428), for the function of the courts is to interpret and declare the law and not to pass judgment on its wisdom or propriety. "... when a question of statutory interpretation arises, the duty of the court is simply to give effect to the will of Parliament, as expressed in the law" (*Chan Chin Ming v. Lim Yok Eng* [1994] 3 MLJ 233 @ 249 per Edgar Joseph Jr. SCJ). "The court has no power to change any words used by the Legislature" (*Tan Boon Kean v. PP* [1995] 3 MLJ 514 @ 525 per Mohamed Azmi FCJ). "Where the meaning of the words is plain and unambiguous it is not for judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral" (*PP v. Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 @ 275 per Suffian LP). "The court ... is not at liberty to treat words of a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded" (*Foo Yoke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35 per Abdoolcader SCJ).

"... the judge must be obedient to the will of the law-maker as expressed in its enactments, the judge has power of choice where differing constructions are possible, but he must choose the construction which in his judgment best meets the legislative purpose of the enactment. Even if the result be unjust but inevitable, he must not deny the statute; unpalatable statute law cannot be disregarded or rejected simply because it is unpalatable; the judge's duty is to interpret and apply it" (*Duport Steels Ltd v. Sirs* [1980] 1 All ER 529). Where there is no ambiguity, *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est,* no exposition shall be made which is opposed to the expressed words of the statute.

"In the construction of all written instruments, including statutes, what the court is concerned to ascertain is not what the promulgators of the instruments meant to say but the meaning of what they have said" (*Farrell v. Alexander* [1977] AC 59; per Lord Salmon). "The safer and more correct course of dealing with the question of construction is to take the words themselves and arrive if possible at their meaning without in the first instance reference to cases" *H Rubber Estates Bhd. v. Director-General of Inland Revenue* [1979] 1 MLJ 115, per Gill CJ (Malaya), citing Maxwell on *Interpretation of Statutes* 12th edn @ 28. "It is not generally permissible to refer to the explanatory statement of a Bill for purposes of statutory interpretation" (*Foo Loke Ying v. Television Broadcasts Ltd & Ors.* [1985] 2 MLJ 35 per Abdoolcader SCJ). However, the courts can refer to the proceedings in Parliament, which are subsequently published in Hansards, as an aid to the construction of legislation "which is ambiguous or obscure or the literal meaning of which leads to an absurdity" (*Pepper v. Hart* [1992] 3 WLR 1032 per Lord Browne Wilkinson) and "provided always that the statement reported in Hansard was made by a Minister or other promoter of a Bill" (*Chor Phaik Har v. Farlim Properties Sdn. Bhd.* [1994] 3 AMR 41:2103 per Edgar Joseph Jr. SCJ).

"In common or ordinary parlance, and in its ordinary signification, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning as denoting obligation. The word in ordinary usage means "must" and is inconsistent with discretion" (*Black's Law Dictionary* 6th edn p. 1375).

Even then, the phrase "shall be liable" has been construed as merely permissive or directory (see *Darus v. PP* [1964] MLJ 322; *Jayanathan v. PP* [1973] 2 MLJ 68). As imparted by judicial pronouncements, the words "shall be liable to" "do not make the prescribed form of punishment mandatory, and the trial court, in an appropriate case, is entitled even to act under s. 294 of the Criminal Procedure Code" (*Abu Seman v. PP* [1982] 2 MLJ 338 @ 342, 343, per Chong Siew Fai J (as he then was)), or pass any lesser sentence (*PP v. Lee Ah Sam* [1949] MLJ 236) but not less than the minimum sentence

specified (*PP v. Hew Yew* [1972] 1 MLJ 164). Contrastingly, the words "shall be punished with" has been construed as mandatory (*Philip Lau Chee Heng v. PP* [1988] 3 MLJ 107). Quite clearly, therefore, the construction of the words "shall be liable" as merely permissive or directory is supported by a host of authorities. Then, the trial court's construction of the words "shall be liable" can be readily accepted. But what could not be readily accepted, however, is the trial court's construction of the word "and" betwixt sub-ss. 16(a) and 16(b).

The ordinary meaning of the word "and" is perhaps best conveyed by the words "together with". "It is a conjunction connecting words or phrases expressing the idea that the latter is to be added to or taken along with the first ... It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and what comes after. In its conjunctive sense, the word is used to conjoin words, clauses, or sentences, expressing the relation of addition or connection, and signifying that something is to follow in addition to that which precedes ..." (*Black's Law Dictionary* 6th edn p. 86).

According to Lord Reid, in *Federal Steam Navigation Co. Ltd v. Department of Trade and Industry* [1974] 2 All ER 97 @ 99, "or can never mean and". But sometimes, it is necessary to construe "and" as "or", "so that the meaning and intent of the Legislature can be carried out" (*PP v. Sharikat Perusahaan Makanan Haiwan Bekerjasama 2* [1969] 2 MLJ 250 per Sharma J) or so as to avoid an absurd consequence (*Yew Lean Finance Development (M) Sdn. Bhd. v. Director of Lands & Mines, Penang* [1977] 2 MLJ 45) or an absurdity (*RF Brown & Co. Ltd v. T and J Harrison* [1927] 43 TLR 394 and 633). "One should, however, be reluctant to convert "and" into "or" or *vice versa* in a penal statute if the result of it is going to be unfavourable to the subject but there is no rule of law to that effect" (*PP v. Sharikat Perusahaan Makanan Haiwan Bekerjasama 2* [1969] 2 MLJ 250 per Sharma J citing *R v. Oakes* [1959] 2 All ER 92).

But there was no such necessity to construe "and" as "or". The ordinary, plain and natural meaning of the word "and", in the context and text of s. 16, is in the conjunctive sense. That is as clear as daylight. And that clear and unambiguous meaning must receive its full effect. After all a literal construction will not produce any absurd consequence. It will produce the consequence – when reading s. 16 as "a person who is found guilty of an offence under ss. 10, 11, 13, 14 or 15 shall on conviction be liable to imprisonment for a term of not less than fourteen days and not more than 20 years; **and** a fine of not less than five times the sum or value of the

gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher" – that a person guilty of the said offences shall on conviction be liable to imprisonment and to a fine. And there is nothing absurd about that punishment.

Mr Asamaley, appearing as *amicus curae* and playing the unenviable but valuable role of the devil's advocate and whose innovative contribution is appreciated, put forth that s. 16 should be read as follows:

> Any person who is found guilty of an offence under section 10, 11, 13, 14 or 15 shall on conviction be liable to –
>
> (a) imprisonment for a term of not less than fourteen days and not more than 20 years; and **shall on conviction be liable to** –
>
> (b) a fine of not less than five times the sum or value of the gratification which is the subject-matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher.

And so reading s. 16, Mr Asamaley proffered, then "any person who is found guilty of an offence ... shall on conviction be liable to imprisonment ... and shall on conviction be liable to a fine ...". Since the words "shall be liable" give the court a discretion, then the word "and" betwixt sub-ss. 16(a) and 16(b) – "and" taking its meaning from what comes before and what comes after – must be construed as "or". Accordingly, so Mr Asamaley further advanced, s. 16 does not impart that the prescribed form of punishment shall be mandatory. Except, that construction will require the court to pen the words "shall be liable to" now missing betwixt sub-ss. 16(a) and 16(b).

Admittedly, courts possess a limited power, when interpreting a statute, to add to, alter or ignore statutory words (*Cross on Statutory Interpretation* 2nd edn p. 192) "where without such substitution the provision is unintelligible or absurd or totally unreasonable, where it is unworkable and where it is totally irreconcilable with the plain intention shewn by the rest of the ... statute" (*Federal Steam Navigation Co. Ltd v. Department of Trade and Industry (supra)* @ 100 per Lord Reid). Every so often, when doing so, that power extends further than merely giving a statutory provision a secondary meaning and stating expressly what was already implied.

Mackinnon LJ in *Sutherland Publishing Co Ltd v. Caxton Publishing Co Ltd* [1938] Ch 174 @ 201 said:

> Where the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used, and of which the plain meaning would defeat the obvious intention of the legislature. It may even be necessary, and therefore legitimate, to substitute for an inept word or words that which such intention requires ... to prevent a result so nonsensical that the legislature cannot have intended it.

But there are limits, even in the circumstances mentioned, to that judicial power. Judicial legislature is certainly not permitted. And courts have no power to fill in the gaps disclosed (*Magor & St. Mellons Rural District Council v. Newport Borough Council* [1952] AC 189 @ 191, and cited in *Tan Boon Kean v. PP* [1995] 3 MLJ 514).

Scarman LJ in *Western Bank Ltd v. Schindler* [1977] Ch 1 @ 18 summed it as follows:

> Judicial legislation is not an option open to an English judge. Our courts are not required ... to declare and insert into legislation rules which the judge would have put there, had he been the legislator. But our courts have the duty of giving effect to the intention of Parliament, if it is possible, even though the process requires a strained construction of the language used or the insertion of words in order to do so ... The line between judicial legislation, which our law does not permit, and judicial interpretation in a way best designed to give effect to the intention of Parliament is not an easy one to draw. Suffice it to say that before our courts can imply words into a statute the statutory intention must be plain and the insertion not too big, or to much at variance with the language used by the legislature. The courts will strain against ... leaving unfilled the *casus omissus*.

On courts "rewriting" statutes, in *Chan Chin Ming v. Lim Yok Eng (supra)*, Edgar Joseph Jr. SCJ had this to say:

> The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. (See *West Coast Hotel Co v. Parrish* [1937] 300 US 379 at p. 404 per Sutherland J) Similarly, Cardozo J said in *Sunprinting and Publishing Association v. Remington Paper and Power Co Inc* [1923] 130 NE 470 at p. 471: 'We are not at liberty to revise while professing to construe.
>
> ... where the enactment of the legislature in clear and unequivocal language is capable of only one meaning, it must be enforced however harsh the result may be. (see *Cartledge v. E Jopling & Sons Ltd* [1963] AC 758; [1963] 1 All ER 341; [1963] 2 WLR 210.) Nor for that matter, may the interpretation of a statute be approached by the court taking into consideration notions as to what is just and expedient. (*Gwynne v. Burnell* [1840] 7 CI & Finn 572 per Goleridge J) As Viscount Birkenhead LC put it in *Sutters v. Briggs* [1922] 1 AC 1 at p. 8:

> The consequences of this view will no doubt be extremely inconvenient to many persons. But this is not a matter proper to influence the House unless in a doubtful case affording foothold for balanced speculations as to the probable intention of the legislature. Where, as here, the legal issues are not open to serious doubt our duty is to express a decision and leave the remedy (if one be resolved upon) to others.

Similarly, in *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 All ER 948 at 954; [978] 1 WLR 231 at p. 238, Lord Edmund-Davies said:

> ... dislike of the effect of a statute has never been an accepted reason for departing from its plain language. Holt CJ said nearly three centuries ago '... an Act of Parliament can do no wrong, though it may do several things that look pretty odd': see *City of London v. Wood* [1701] 12 Mod Rep 669 at pp. 687-688. Accordingly, even if one regarded the policy implicit in (the Act concerned) as open to criticism, (if) the statutory language is clear beyond doubt ... (it) must prevail.

So, also, in *Mohamed Noor bin Othman & Ors v. Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 at p. 84, Hashim Yeop A Sani SCJ speaking for the Supreme Court said:

> is trite that where the words of a statute are clear and there is no room for the court to go beyond the expressed language of the statute.

But clearly, in the case of the instant s. 16, there is no room for the court to go beyond the expressed language of the statute. The expressed language is clear, certain and unambiguous. A literal interpretation will not stultify the purpose of the statute or otherwise produce some injustice, absurdity, anomaly or contradiction. This is not a case where some secondary sense may be preferred, to obviate the injustice, absurdity anomaly or contradiction or fulfill the purpose of the statute. This is also not a case where the addition, alteration or substitution of statutory words, without which s. 16 is unintelligible, absurd, totally unreasonable, unworkable and or totally irreconcilable with the plain intention of the ... statute, is required.

Differing constructions, given the clear and unambiguous language of s. 16, are not possible. For to read s. 16 as proposed by learned counsel, by adding the words "shall be liable to" betwixt sub-s. 16(a) and sub-s. 16(b), would be judicial legislation or judicial revision under the guise of interpretation. And to read the word "and" as "or", as did the trial court, would change the unambiguous word of the legislature.

Accordingly, it was incumbent upon the trial court to interpret literally, by giving s. 16 its ordinary, plain and natural meaning, which is "that any person convicted ... shall be liable to imprisonment ... and a fine ..." That is not to say though that the prescribed form of punishment under s. 16, because the words "shall be liable to" have been construed as permissive, is mandatory. After all, in an appropriate case, a court is entitled to act under s. 294 of the Criminal Procedure Code. That power has not been taken away. But if a court should act under s. 16, then it cannot deny the effect of s. 16 but must impose the prescribed imprisonment under sub-s. 16(a) and the prescribed fine under sub-s. 16(b). That is the only possible construction.

In *Stock v. Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 @ 236, Lord Simon said:

> The final task of construction is still, as always, to ascertain the meaning of what the draftsman has said, rather than to ascertain what the draftsman meant to say. But if the draftsman is correct these should coincide.

Interestingly, the explanatory statement of the Bill reads as follows:

> Penalti paling berat dalam Bahagian II Akta 57 ialah denda maksimum sepuluh ribu ringgit atau pemenjaraan selama tempoh maksimum tujuh tahun atau kedua-duanya. Penalti yang dicadangkan dalam fasal 17 Rang Undang-Undang ini ialah pemenjarakan selama tempoh minimum enam bulan dan tempoh maksimum dua puluh tahun dan denda tidak kurang daripada lima kali ganda nilai suapan yang di tawarkan atau diterima, jika dapat dinilaikan, atau sepuluh ribu ringgit, mengikut yang mana-mana yang lebih tinggi.
>
> Adalah dicadangkan supaya Mahkamah masih diberi budi bicara sama ada hendak membenarkan tertuduh diikat jamin di bawah seksyen 173A atau 294 Kanun Tatacara Jenayah.

Evidently, the meaning of what has been said and what the draftsman meant to say coincide. Then, it must be said that the draftsman was absolutely correct.

Pursuant to the powers under part VII chapter XXXI of the Criminal Procedure Code, the nature of the sentence of the trial court is hereby altered, (i) by the imposition of a fine of RM10,000 or in default three months' imprisonment with effect from the date of conviction (3 April 1998), and, (ii) by the reduction of the custodial sentence – since a sentence of eight months' imprisonment for offering a bribe of RM170 to avoid prosecution for entering the country illegally is obviously harsh and excessive, since the learned DPP graciously entrusted the matter of the reduction of the custodial sentence, even though there is no appeal, to the court, and since it is so demanded in the interest of justice – to five month's imprisonment with effect from 3 April 1998.